No. 16-1519

In the Supreme Court of the United States

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the district court erred in ordering restitution for internal investigation expenses and attorney's fees that were caused by petitioner's fraud offenses.

TABLE OF CONTENTS

Page

Opinion below 1
Jurisdiction 1
Statement 1
Argument 6
Conclusion 14

TABLE OF AUTHORITIES

Cases:

Dolan v. *United States*, 560 U.S. 605 (2010) 8, 11
United States v. *Amato*, 540 F.3d 153 (2d Cir. 2008), cert. denied, 556 U.S. 1138 (2009) 9
United States v. *Elson*, 577 F.3d 713 (6th Cir. 2009) 8, 13
United States v. *Fair*, 699 F.3d 508 (D.C. Cir. 2012) 14
United States v. *Hosking*, 567 F.3d 329 (7th Cir. 2009) 8, 11, 13
United States v. *Janosko*, 642 F.3d 40 (1st Cir. 2011) 8
United States v. *Maynard*, 743 F.3d 374 (2d Cir. 2014) 12
United States v. *Nosal*, 844 F.3d 1024 (9th Cir. 2016), cert. denied, No. 16-1344, 2017 WL 1807382 (Oct. 10, 2017) 8
United States v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011) 6, 9, 10, 11, 12
United States v. *Phillips*, 477 F.3d 215 (5th Cir.), cert. denied, 552 U.S. 820 (2007) 9
United States v. *Scott*, 405 F.3d 615 (7th Cir. 2005) 13
United States v. *Stennis-Williams*, 557 F.3d 927 (8th Cir. 2009) 9

Statutes: Page

Mandatory Victims Restitution Act of 1996, Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227 3
18 U.S.C. 3663A 3, 14
18 U.S.C. 3663A(a)(1) 4
18 U.S.C. 3663A(a)(2) 4, 8
18 U.S.C. 3633A(b)(1) 4, 6, 7, 12, 13, 14
18 U.S.C. 3663A(b)(4) ..... *passim*
18 U.S.C. 3663A(c)(1)(A)(ii) 4
18 U.S.C. 1343 1
18 U.S.C. 1349 1

Miscellaneous:

S. Rep. No. 179, 104th Cong., 1st Sess. (1995) 7

In the Supreme Court of the United States

No. 16-1519

SERGIO FERNANDO LAGOS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 864 F.3d 320.

JURISDICTION

The judgment of the court of appeals was entered on March 17, 2017. The petition for a writ of certiorari was filed on June 15, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the Southern District of Texas, petitioner was convicted on one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. 1349, and five counts of wire fraud, in violation of 18 U.S.C. 1343. C.A. ROA 170-171. The district court sentenced petitioner to 97 months of imprisonment, to be followed by three years

of supervised release, and ordered $15,970,517 in restitution. *Id.* at 172-173, 175. The court of appeals affirmed. Pet. App. 1a-11a.

1. Petitioner was the owner and CEO of a holding company that owned USA Dry Van Logistics LLC (Dry Van).[1] C.A. ROA 353. Petitioner and his associate, Aurelio Aleman-Longoria, entered into a revolving-loan finance agreement on behalf of Dry Van with General Electric Capital Corporation (GECC). *Ibid.* The agreement required Dry Van to use all proceeds from the loan for business purposes and to notify GECC of any material changes in its financial affairs. *Ibid.* The loan was secured by Dry Van's accounts receivable, and Dry Van was required to submit "Borrowing Base Certificates" to justify advances on the line of credit. *Ibid.* The credit line varied based on Dry Van's eligible accounts receivable, which consisted of accounts that were less than 90 days old. *Ibid.* In May 2003, Dry Van obtained an initial line of credit of between $2 million and $3 million. *Id.* at 354. The line of credit eventually increased to $35 million by October 2009. *Ibid.*

From early 2008 through early 2010, petitioner, Aleman-Longoria, and Dry Van's controller defrauded GECC by making false representations regarding Dry Van's accounts receivable. C.A. ROA 354. The fraud took several forms. First, petitioner and his confederates booked fake sales to create fictitious accounts receivable, which they then used to expand their credit with GECC. *Id.* at 242, 355. Second, they transferred loan proceeds into a lockbox account in Chicago, Illinois and used those funds to make payments on the fictitious

---

[1] This brief will use "Dry Van" to refer to USA Dry Van Logistics LLC, its holding company, and the holding company's other subsidiaries.

accounts receivable, giving the false impression that customers were paying on those accounts. *Ibid.* Third, they "re-ag[ed]" accounts to make them appear that they had been created more recently, thereby making the accounts "eligible" for use as collateral. *Id.* at 355. The end result was that approximately $26.726 million of Dry Van's $37.266 million in accounts receivable were fraudulent. *Ibid.*

Petitioner and Aleman-Longoria eventually admitted to an outside consultant that they had committed fraud. C.A. ROA 358. On January 25, 2010, they disclosed the fraud to GECC, and Dry Van declared bankruptcy the following week. *Ibid.* Even after admitting the fraud and declaring bankruptcy, however, petitioner and Aleman-Longoria continued to take money from Dry Van for their own use. *Ibid.*

Shortly thereafter, in March 2010, GECC filed a civil action against petitioner and Aleman-Longoria, which resulted in separate agreed judgments against each of them for over $33.555 million, plus interest. C.A. ROA 359; see Agreed Judgment at 1, *General Elec. Capital Corp.* v. *Lagos*, No. 7:10-cv-77 (S.D. Tex. Aug. 16, 2010) ($33.555 million judgment against petitioner).

2. In 2013, a federal grand jury indicted petitioner on one count of conspiracy to commit wire fraud and five counts of wire fraud. C.A. ROA 13-21. Petitioner subsequently pleaded guilty to all counts without a plea agreement. *Id.* at 7, 352.

a. The Mandatory Victims Restitution Act of 1996 (MVRA), Pub. L. No. 104-132, Tit. II, Subtit. A (§ 201 *et seq.*), 110 Stat. 1227, specifies procedures for awarding restitution as a mandatory component of the sentence for certain federal criminal offenses. 18 U.S.C. 3663A. The MVRA provides that, when sentencing a

defendant convicted of an offense against property or other specified offenses, the district court "shall order * * * that the defendant make restitution to the victim of the offense," 18 U.S.C. 3663A(a)(1) and (c)(1)(A)(ii), where "'victim'" means any "person directly and proximately harmed as a result of the commission of [the relevant] offense," 18 U.S.C. 3663A(a)(2).

"[I]n the case of an offense resulting in damage to or loss or destruction of property of a victim of the offense," the MVRA provides that the order of restitution "shall require" that the defendant return the property to its owner or, if such return is impossible, impracticable, or inadequate, "pay an amount equal to" the "value of the property" less any part of the property returned. 18 U.S.C. 3663A(b)(1).

The MVRA further provides that, "in any case," the order of restitution shall require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

b. The presentence investigation report recommended a restitution award to GECC for its unrecovered loan principal, which totaled about $11.074 million. C.A. ROA 385; see *id.* at 360, 379, 382. Petitioner did not object to that amount, *id.* at 390-391, and does not now dispute that restitution for that amount was appropriate, Pet. 6 n.2.

The government recommended an additional $4.895 million in restitution to compensate GECC for the forensic expert fees (over $20,000), legal fees (over $1.776 million), and consulting fees (over $2.311 million) that GECC incurred in investigating petitioner's fraud, plus

the legal fees (over $787,000) it expended during Dry Van's bankruptcy proceedings. C.A. ROA 340, 384. Petitioner objected to that additional restitution. *Id.* at 390-391.

The district court sentenced petitioner to 97 months of imprisonment, to be followed by three years of supervised release. C.A. ROA 172-173. The court adopted the government's restitution recommendation and ordered approximately $15.970 million in restitution. *Id.* at 175, 273.

3. The court of appeals affirmed. Pet. App. 1a-11a. As relevant here, the court upheld the district court's restitution award, rejecting petitioner's contention that the award should not have included reimbursement for GECC's "forensic expert fees, legal fees, and consulting fees," *id.* at 2a. See *id.* at 2a-5a.

Section 3663A(b)(4), the court of appeals explained, "authorizes restitution of expenses incurred while participating in the investigation or prosecution of the offense." Pet. App. 2a-3a. That statutory authorization had been held in prior cases to "encompass[] attorneys' fees and other expenses stemming from the investigation and prosecution of the offense." *Id.* at 3a. Consistent with those decisions, the court concluded that the disputed fees incurred by GECC were both "necessary and compensable in the restitution award." *Id.* at 4a.

Petitioner's "wire fraud scheme," the court of appeals explained, "caused GECC to employ forensic experts to secure and preserve electronic data as well as lawyers and consultants to investigate the full extent and magnitude of the fraud and to provide legal advice relating to the fraud." Pet. App. 4a. Similarly, the court

continued, the legal fees that GECC incurred in bankruptcy proceedings "were directly caused by [petitioner's] fraud," because petitioner's "fraudulent scheme directly caused [his and his co-defendant's] companies (the GECC borrowers) to file for bankruptcy" and the bankruptcy court "ordered GECC to continue to make advances to [those] companies during the bankruptcy proceedings." *Ibid.*

The court of appeals observed that the D.C. Circuit had "take[n] a narrower view of restitution under subsection 3663A(b)(4)." Pet. App. 4a-5a (citing *United States* v. *Papagno*, 639 F.3d 1093 (D.C. Cir. 2011)). That decision, the court observed, was "unique among the circuits" and did not disturb the result in this case. *Id.* at 5a n.2 (citing cases).

b. Judge Higginson concurred. Pet. App. 6a-11a. Judge Higginson concluded that the panel was bound by prior precedent and wrote separately "only to suggest that we may be interpreting Section 3663A(b)(4) too broadly." *Id.* at 6a. Petitioner did not request rehearing en banc.

ARGUMENT

Petitioner contends that the court of appeals erred in determining that Section 3663A(b)(4) authorizes restitution for the cost of GECC's internal investigations on the ground that the government did not require or request that GECC incur those costs. Pet. 8, 27-29. The court of appeals correctly upheld the restitution award in this case. Other courts of appeals have upheld similar restitution awards under both Section 3663A(b)(1) and Section 3663A(b)(4). No court of appeals has concluded that neither of those provisions authorize such an award. Accordingly, petitioner's assertion of a limited division of authority with respect only to Section

3663A(b)(4) does not reflect a disagreement that would preclude the award of restitution in this case in any court of appeals. Review by this Court is unwarranted.

1. Congress enacted the MVRA in 1996 to provide "full restitution to all identifiable victims of covered offenses," deeming it "essential that the criminal justice system * * * , to the extent possible, ensure that [an] offender be held accountable to repay the[] costs" that his offense imposes "on the victim." S. Rep. No. 179, 104th Cong., 1st Sess. 18 (1995). To that end, multiple provisions within Section 3663A(b) specify mandatory awards of restitution based on the nature of the defendant's offense. Section 3663A(b)(1), for instance, broadly requires restitution, as relevant here, in the case of "an offense resulting in * * * loss * * * of property of a victim of the offense" and requires either return of the property or restitution in an amount equal to its value if its return would be "impossible, impracticable, or inadequate." 18 U.S.C. 3663A(b)(1). Section 3663A(b)(4) additionally contains a catchall provision that applies "in any case" and requires that the court's order of restitution require the defendant to "reimburse the victim for lost income and necessary child care, transportation, and other expenses incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4).

Although Section 3663A(b)(1) and (4) could both independently authorize restitution when the defendant's offense "result[s] in" a victim's loss of property, the court of appeals in this case affirmed the district court's award of restitution under Section 3663A(b)(4). The court of appeals determined that the "loss[es]" that

GECC incurred in its internal investigation into petitioner's fraud and in the ensuing bankruptcy proceedings for petitioner's companies all were losses "directly and proximately caused by [petitioner's] offense." Pet. App. 2a (quoting 18 U.S.C. 3663A(a)(2)); see *id.* at 4a. Petitioner does not dispute that factbound determination. Petitioner instead disputes that the losses qualify under Section 3663A(b)(4) as "necessary" expenses incurred during GECC's "participation in the investigation or prosecution of [petitioner's] offense" and its "attendance at proceedings related to the offense," 18 U.S.C. 3663A(b)(4). See Pet. App. 2a-4a.

The courts of appeals have overwhelmingly rejected petitioner's position. Consistent with the recognition that the MVRA's "substantive purpose" is "to ensure that victims of a crime receive full restitution," *Dolan* v. *United States*, 560 U.S. 605, 612 (2010), all but one of the courts of appeals to have addressed the issue have agreed that Section 3663A(b)(4) requires restitution for attorney's fees and other internal investigation costs that a victim incurs as a result of the defendant's offense. See *United States* v. *Nosal*, 844 F.3d 1024, 1046-1047 (9th Cir. 2016) (internal "investigation costs and attorneys' fees" are recoverable if they are the "'direct and foreseeable result' of the defendant's wrongful conduct") (citation omitted), cert. denied, No. 16-1344, 2017 WL 1807382 (Oct. 10, 2017); *United States* v. *Janosko*, 642 F.3d 40, 42 (1st Cir. 2011) (Souter, J.) (cost of credit monitoring after data breach); *United States* v. *Elson*, 577 F.3d 713, 727-728 (6th Cir. 2009) (attorney's fees incurred in "discovering and investigating" defendant's fraud in attempt to recover lost funds); *United States* v. *Hosking*, 567 F.3d 329, 332 (7th Cir. 2009) (bank's inter-

nal investigation costs); *United States* v. *Stennis-Williams*, 557 F.3d 927, 930 (8th Cir. 2009) (attorney's fees and accountant fees incurred during internal investigation of defendant's fraud); *United States* v. *Amato*, 540 F.3d 153, 159-160 (2d Cir. 2008) (attorney's fees and internal investigation costs), cert. denied, 556 U.S. 1138 (2009); *United States* v. *Phillips*, 477 F.3d 215, 224 (5th Cir.) (costs of internal damage assessment and of contacting other victims of data breach); cert. denied, 552 U.S. 820 (2007). But see *United States* v. *Papagno*, 639 F.3d 1093, 1095 (D.C. Cir. 2011) (holding that internal investigation expenses are not recoverable if the investigation is not required or requested by the government). That conclusion reflects "the plain language of the statute," which "gives the district courts broad authority" to determine when an expense was "necessary" and covers such expenses "'incurred during participation in the investigation or prosecution of the offense or attendance at proceedings related to the offense.'" *Amato*, 540 F.3d at 160 (quoting 18 U.S.C. 3663A(b)(4)).

2. Petitioner contends (Pet. 10-13, 27-28) that the court of appeals in this case misconstrued Section 3663A(b)(4) and that the D.C. Circuit in *Papagno* correctly read that provision exclude restitution for "an internal investigation that is neither required nor requested by criminal investigators or prosecutors," 639 F.3d at 1095. *Papagno* concluded that such expenses are not "necessary" and do not involve "participation in the investigation or prosecution of the offense" unless the government requires or requests it. *Ibid.* (citation and emphasis omitted). Petitioner's reliance on *Papagno* is misplaced.

In *Papagno*, the parties both assumed that the relevant "investigation" was the government's *criminal* investigation. 639 F.3d at 1097-1098. The statutory text, however, contains no explicit limitation to that effect. Although the text refers to "the investigation," in the singular, 18 U.S.C. 3663A(b)(4), default interpretive principles direct that "words importing the singular include and apply to several persons, parties, or things," 1 U.S.C. 1. In any event, the "investigation * * * of the offense" is not naturally limited solely to federal investigatory activities, but instead includes a broad range of inquiries into a defendant's unlawful conduct. Petitioner would presumably acknowledge, for example, that an initial investigation by state authorities before any federal involvement is anticipated would qualify. And in the absence of any language cabining the provision to public investigations, no basis exists for excluding investigatory activities that, say, crack open the case for presentation to federal authorities on the ground that they were undertaken by the victim rather than the local authorities.

In any event, even assuming that premise, the panel erred in reasoning that a victim does not "participat[e]" in a criminal investigation by merely "assist[ing]" or "aid[ing]" it and must instead actively "take part in" the investigation. *Papagno*, 639 F.3d at 1098 (citation omitted). That narrow construction does not account for the context in which Congress used the term. Section 3663A(b)(4) broadly refers to "participation in the investigation or prosecution of the offense." 18 U.S.C. 3663A(b)(4). A private individual—unlike a government prosecutor of investigator—is not understood as a matter of common parlance ever to "take part in" a criminal investigation or prosecution, except to the extent he

provides his assistance in the investigation or prosecution.

Papagno's view that the "costs of an internal investigation cannot be said to be *necessary* if the investigation was neither required nor requested" by the government, 639 F.3d at 1095 (emphasis added), likewise takes an unduly restrictive approach. In *Hosking*, for instance, the victim "bank's investigation" was necessary to determine "the actual amount embezzled" and was therefore an "important part of 'the investigation . . . of the offense.'" 567 F.3d at 332. Victims in financial crimes not infrequently conduct their own investigations to determine what occurred before alerting and providing their investigatory fruits to authorities. Such an investigation is logically understood to be a "necessary" expense, even if the government (which might be yet unaware of the criminal conduct) has not requested or required it. Indeed, *Papagno*'s restrictive understanding of Section 3663A(b)(4) loses sight of the fact that the MVRA's "purpose" is "to ensure that victims of a crime receive full restitution." *Dolan*, 560 U.S. at 612.

Finally, *Papagno* does not address Section 3663A(b)(4)'s requirement for restitution of expenses incurred during "attendance at proceedings related to the offense." 18 U.S.C. 3663A(b)(4). That language necessarily encompasses expenses other than those relating specifically to government investigations, and would include, for example, the fraud-induced bankruptcy proceedings that cost GECC a substantial amount of money here.

3. Petitioner asserts (Pet. 23-24) that this Court should grant review because the D.C. Circuit's divergent interpretation of Section 3663A(b)(4) reflects

"real-world differences" that will produce "substantial[ly]" different restitution awards "based solely on whether a defendant was convicted in the District of Columbia or [elsewhere]." Petitioner is incorrect.

The D.C. Circuit in *Papagno* confronted unusual circumstances under which a governmental victim had conducted an expensive internal investigation *after* "almost everything that [the defendant] stole" had been recovered. 639 F.3d at 1095. The D.C. Circuit set aside such restitution, *ibid.*, which might not have been recoverable in other courts of appeals. Cf. *United States* v. *Maynard*, 743 F.3d 374, 381 (2d Cir. 2014) (holding that a bank was not entitled to restitution for the cost of producing wanted posters after a robbery where the police "did not seek the bank's cooperation in postering the neighborhood" and "the bank had no interest to protect by an independent investigatory effort").

Papagno based its judgment on its view that Section 3663A(b)(4) does not "authorize restitution for the costs of an organization's internal investigation, at least when * * * the internal investigation was neither required nor requested by the criminal investigators or prosecutors." *Papagno*, 639 F.3d at 1095. That formulation was far broader than was necessary for the panel to resolve the case before it. And the D.C. Circuit has not in the six years since *Papagno* had occasion to determine whether restitution of the sort at issue in this case could be justified under any other statutory authority.

Several other courts of appeals, however, have considered the issue and upheld awards of restitution for internal-investigation costs and attorney's fees under a separate provision of the MVRA, 18 U.S.C. 3663A(b)(1). Section 3663A(b)(1), as relevant here, applies to "an offense *resulting in* * * * loss * * * of property of a victim

of the offense" and requires return of the property or restitution equal to it value if returning such property would be "impossible, impracticable, or inadequate." 18 U.S.C. 3663A(b)(1) (emphasis added). That textually broad authorization, several courts of appeals have held, independently authorizes restitution awards similar to the one in this case. See, *e.g.*, *Elson*, 577 F.3d at 726-728 (holding that attorney's fees incurred because of fraudulent conspiracy were subject to restitution under both Section 3663A(b)(1) and (4)); *Hosking*, 567 F.3d at 332 (holding that bank's expenses investigating the defendant's fraudulent scheme were recoverable under Section 3663A(b)(1) and (4)); *United States* v. *Scott*, 405 F.3d 615, 618-620 (7th Cir. 2005) (holding that fraud offense resulted in victim's internal audit fees and that such fees were recoverable as restitution for a "loss" of property under Section 3663A(b)(1)).

In *Hosking*, for example, the defendant embezzled over $502,000 from a bank. 567 F.3d at 331. The Seventh Circuit reasoned that expenses incurred through the efforts of "the bank's employees and outside professionals in unraveling the twelve-year embezzlement scheme" were recoverable under Section 3663A(b)(1) because they were "a direct and foreseeable result of the defendant's conduct." *Id.* at 332. The same reasoning applies to the disputed portions of the restitution award in this case. As a result, the fact that the court of appeals' precedent required in this case that restitution be awarded under Section 3663A(b)(4) rather than Section 3663A(b)(1) (which it has interpreted more narrowly) was academic. See Pet. App. 2a-5a.

The D.C. Circuit has yet to address whether restitution similar to that in this case could be awarded under Section 3663A(b)(1). Indeed, we have found only one

D.C. Circuit decision that has ever had occasion separately to discuss Section 3663A(b)(1)'s requirements. See *United States* v. *Fair*, 699 F.3d 508, 512 (D.C. Cir. 2012). Furthermore, as petitioner acknowledges (Pet. 15-16), no other court of appeals has concluded that Section 3663A prohibits such restitution awards.

Accordingly, petitioner has failed to demonstrate that any prosecution in any court of appeals would result in any "real-world differences" (Pet. 24) that would lead a court to reject the type of restitution in this case. Because such an award could be justified under either Section 3663A(b)(1) and Section 3663A(b)(4) and because no court has deemed both provisions insufficient to warrant such restitution, petitioner has at the most identified a theoretical possibility for divergent outcomes in different courts, not an actual conflict that would mandate divergent results. Until such a "real world" conflict arises, this Court's review is unwarranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
JOHN P. CRONAN
Acting Assistant Attorney General
WILLIAM A. GLASER
Attorney

NOVEMBER 2017